In the Supreme Court **HCJ 9594/03**
sitting as the High Court of Justice

B'Tselem et al.
represented by attorneys Stein *et al*.

The Petitioners

v.

Judge Advocate General
represented by the State Attorney's Office
Ministry of Justice, Jerusalem

The Respondent

Response on behalf of the State Attorney's Office

In this petition, the Petitioners request that the Honorable Court require the IDF to open a Military Police (MP) investigation into the circumstances of the deaths of eight residents of Judea and Samaria and the Gaza Strip, who were killed in *six different incidents* during IDF operations in these areas.

The Court is also requested to require the Judge Advocate General (hereafter: the JAG) to order a MP investigation "in every case in which he is informed of the death of a Palestinian who did not take part in the hostilities, in the course of IDF actions in the Occupied Territories, and to conduct the investigation within a reasonable time after the occurrence of the incident."

In response to this petition, the Respondent will argue that both portions of this petition should be summarily dismissed. Below we shall respond to the two portions in order.

The first demand

1. *Regarding the first part of the petition, which deals with six different cases in which the Respondent is demanded to order a Military Police investigation, the Petitioners combined six separate petitions that relate to separate incidents into one petition.*

On this point, the Honorable Justice Heshin stated, in his decision of 14 December 2003, that:

> The petition contains, in effect, six separate and different petitions, and a separate petition should have been filed for each and every incident. Such has been the practice in this court for some time, and it is presumed that the Petitioners know this. For the moment, I only wish to direct the Petitioners' attention to my observation.

2. This decision is based on traditional case law, which has stated time and again that different matters are not to be combined into one petition, where the factual background of the cases differ. The reason for this practice is that combining the matters (or the petitioners) creates unnecessary complications and confusion. The Honorable Court has held, time after time, that the combining of petitions in such cases can lead to the *summary* dismissal of the petition, with the petitioners having the right to file a separate petition in each matter, provided there is a basis for the petition.

See, for example, the comments of the Honorable Court in HCJ 6432/01, *Hassan v. Head of the Visa Department, Takdin Elyon* 2001 (3) 1668, as follows:

> In the petition directed against the director of the visa department in the Population Administration, the petitioners contend that the respondent routinely refused to address their requests. They request that the Court direct her to respond to their requests…
>
> This court has held that, where separate matters are combined in one petition, the petition should be summarily dismissed for that reason. Although the petitioners' requests are similar in nature, the ruling explained, when different petitioners with separate matters are involved, the petitioners must file separate petitions (see: HCJ 452/99, *'Ali Pera v. Minister of Police*; HCJ 5866/01, *'Amad v. Ministry of Interior*). In this case, the matter involving each petitioner differs in its circumstances from each of the others…

See, also, HCJ 5866/01, *Zeytun 'Amad et al. v. Minister of Interior, Population Administration District, East Jerusalem, Takdin Elyon* 2001 (3) 1066, which held that:

> The two petitioners are residents of Jerusalem who married Jordanian nationals on 20 November 2000. In their petition, they request that the respondent be directed to show cause why he does not grant their request for visas that will allow their wives to enter Israel…
>
> The State correctly argued that the petition should be summarily dismissed because it combines two separate matters into one petition. In the present case, even if the requests made in the two petitions are of a similar nature, two separate matters are involved, so they must file separate petitions.

See, also, for example, the recent judgement given in HCJ 4882/03, *Jabarin v. Minister of Interior, Takdin Elyon* 2003 (2) 2, where the Court ruled:

> Indeed, the petitioners' matters are of a similar nature, but each of them contain its own special circumstances, because different families are involved. Therefore, hearing each of the matters in the context of one petition is liable to be complicated and prolonged, and it has been held by this court that the filing of petitions in this manner is improper and undesirable (HCJ 5866/01, HCJ 7016/01).
>
> Therefore, we decide to summarily dismiss the petition. The petitioners have the right to file separate petitions, provided that they have basis therefore.

3. The present matter involves six different incidents, and each entails a different factual basis. At times, in the judgments cited above and in other judgments, the Court dismissed petitions for combining two or three matters into one petition. Dismissal on these grounds is particularly applicable in the present petition in that it combines six different matters involving different circumstances, into one petition.

4. Therefore, we shall argue that it is improper to file one petition in place of six petitions, and the Honorable Court is requested to summarily dismiss the first part of the petition, with the petitioners having the right to file separate petitions if they have a basis therefore.

5. Furthermore, as regards the cases described in sections 10 and 11 of the petition, the petition is premature in that the demands were raised before the army reached a final decision whether to open a Military Police investigation. In the meantime, a decision has been made in one case, and notification on that matter will be sent to the Petitioners.

To complete the picture, we should mention that, in the case described in Section 6 of the petition, in which an initial decision was made not to open a Military Police investigation, after the material that had been collected was reexamined, it was decided, on 22 October 2003, a few days *before the filing of the petition,* to order a Military Police investigation in that matter. Thus, this particular subject is now theoretical.

The second demand

6. In the second part of the petition, the Petitioners seek general and sweeping relief – whereby the JAG will be required to order a Military Police investigation *in*

every case in which he is informed of the death of a Palestinian civilian who did not take part in the hostilities, during IDF operations in the region.

On this point, it will be argued that this claim, too, must be dismissed summarily in that the relief sought is *general and theoretical.*

This claim is similar to a request submitted to the Court to require the Attorney General to open a criminal investigation in every case in which every person in Israel dies, in every case in which he is informed by the petitioners or others of the existence of corruption in a government ministry, or other similar phenomena.

7. As is known, the decision whether to open an investigation is subject to the discretion of the authorities charged with investigation and prosecution.

Where the decision involves the exercise of discretion, it is clear that each decision is made after the elements of the specific case are examined, based on the particular circumstances, the facts of the case, and application of the relevant legal-policy considerations. Automatic decision making in opening an investigation is not only unnecessary, it does not enable the Respondent to exercise the discretion given him, and is liable to lead to worthless investigations.

8. In this context, we refer the Court to the common law which holds that a decision to open an investigation is subject to the prosecution's discretion, which is to be exercised in each case carefully and with the awareness of the far-reaching significance of opening a criminal investigation on the rights of the potential suspect.

Indeed, this common-law ruling relates to the authority of the Attorney General and the State's Attorney to order an investigation, but the Court has ruled that the authority of the JAG and the military prosecutor on this subject is comparable to the authority of the Attorney General and the State's Attorney.

For example, in HCJ 2644/94, *Perchik et al. v. Attorney General, Piskei Din* 48 (4) 341, 343, it was held that:

> The filing of an indictment – and the existence of the criminal investigation that leads to it – are subject to the (quasi-judicial) discretion of the Attorney General.

9. Recently, this discretion was discussed in HCJ 1689/02, *Nimrodi v. Attorney General, Takdin Elyon* 2003 (3) 139. In the judgment, the Court referred to an earlier judgment that dealt with the same subject. We refer to HCJ 3993/01, *The*

Movement for Quality Government v. Attorney General (not yet published). Because of the importance of the comments, we shall quote them, as stated in *Nimrodi*:

> The opening of a criminal or disciplinary investigation against a public official, and an investigation against a police investigator is included in this category, is a step of great import and grave implications on the functioning of the system over which he [the Attorney General] is charged and as regards the individual personally. Such an investigation affects the public status of the police system and the manner in which it functions. It entails grave harm to the person against whom the complaint is made, both as to his status and his performance, and to his private life. *The effect of such an investigation on the public system and on the individual requires that the competent official take great care in exercising his discretion as to when to open an investigation and when to refrain from doing so.* Together with the requisite care in making the decision to open an investigation, responsibility also dictates that he refrain from closing complaints of substance, where the evidence shows that in carrying out his tasks, the police official violated the binding rules of conduct.

In HCJ 3993/01, *The Movement for Quality Government in Israel v. Attorney General et al.* (not yet published), the Court held, with Justice Strasberg-Cohen writing for the Court):

> When the State Attorney's Office exercises its discretion regarding an examination so that it can decide whether to order a police investigation, the decision is liable to have fateful effects on the person against whom the complaint was submitted and particular importance to the public in general. Therefore, such an examination should be made in a thorough and responsible manner, in the gathering of all the relevant information and in the handling thereof. Such an examination is part of the decision-making process that the State Attorney's Office is empowered to employ … The State Attorney's Office is involved in criminal police investigations and at times monitors them, and has the responsibility for deciding if there is a suspicion that a criminal offense was committed, who is suspected of committing it, and to order an investigation accordingly. *As stated, criteria cannot be set as regards the scope, nature, and quality of the examination, and this matter is to be left to the discretion of the State Attorney's Office, with each case being determined based on its merits and circumstances.*… The Attorney General and the State Attorney's Office are the professional bodies charged with maintaining the rule of law. They are independent bodies and must act impartially, without favoritism, without discrimination, and according to the principle that everyone is equal before the law. The decision how to deal with a complaint submitted to the State Attorney's Office regarding suspicion of the commission of a penal offense, as in the case of many other decisions, must be made not according to the identity of the

> person against whom the complaint was submitted but according to the nature of the matter and the circumstances in which it occurred. As the suspicion relates to more serious and complicated offenses, it increases the uncertainty regarding the question of whether there is a factual or legal basis for the suspicions raised in the complaint, and increases the concern that the complaint is liable to be seen as "baseless," either because of the status of the person against whom the complaint was made or for another reason, and a more comprehensive and extensive examination is necessary before the decision is made.

Because of its significance and repercussions, a criminal or disciplinary investigation against a police official requires a firm factual basis to justify it. Discretion regarding the determination as to whether such a foundation exists is given to the Attorney General as head of the prosecution. Interference in this discretion is rare and is reserved for exceptional cases in which it seems that there was substantial deviation from the reasonable boundaries within which discretion should have been exercised.

10. These two judgments clearly indicate how much care has to be given in exercising the discretion given to the persons empowered to order an investigation. It is absolutely clear that these comments, which were made regarding the opening of every investigation, are surely relevant to opening an investigation in a situation in which it is possible that no offense was committed, i.e., when the death occurs incidental to combat operations. Therefore, it is argued that the Petitioners' demand to require the Respondent to open an investigation *without considering the circumstances of each and every case,* is extreme and without foundation.

11. It should be noted that in effect, the Petitioners, too, do not dispute the discretion given to the Respondent in the matter under discussion – see Section 27 of the petition. However, they believe that in cases of death, the permission given the Respondent becomes compulsory. This contention is unfounded and illogical, for the Petitioners certainly do not dispute the fact that there can be many cases of death that do not raise any suspicion that an offense has been committed.

Therefore, it is argued that the second part of the petition should be rejected because it raises a demand that has no legal foundation and because it is general and theoretical.

12. Although superfluous, we wish to mention that the request of the Petitioners should also be rejected on substantive grounds, because there is no defect in the policy regarding the opening of criminal investigations in time of hostilities, as

implemented by the IDF since September 2000. This policy provides that the decision as to whether an investigation is opened in a particular case is based on the relevant information obtained by the authorities; The primary basis for the decision is the information obtained during the detailed operational debriefings that are customarily prepared, together with all other relevant information that is received in the matter, such as complaints and testimonies.

This policy was presented in large part to the Petitioners as part of the correspondence with them.

See, for example, Appendixes 28, 31, and 33 of the petition.

It should be mentioned that, based on such examinations, since the outbreak of the Palestinian terror, it was decided to open at least 470 Military Police investigations. Seventy of these investigations dealt with shooting by soldiers, most of which resulted in death or serious injury.

These figures clearly show that the policy is not one of a sweeping refusal to open investigations, but a policy in which decisions are reached in each case based on the particular circumstances.

13. The Respondent will further argue that his decisions, which are determined on a case-by- basis depending on the circumstances, conforms well with international law and with the statutes and common law of the State of Israel, and also with the practice of foreign forces as regards the opening of criminal investigations in time of hostilities.

14. On this point, we wish to mention in brief, that a review of the rules and principles of international law expressly indicates that, during hostilities, and especially in combating terror in densely populated areas, harm to civilians is liable to be part of the harsh consequences of the hostilities. The fact that an innocent person is injured during hostilities does not in and of itself indicate that a war crime has been committed or that the soldiers involved acted in a criminal manner. Rather, each case should be examined in the context of its circumstances.

15. Israeli law also contains extensive case law, whereby military operations are not similar to other activity, and that, in light of the nature and substance of this activity, *opening a criminal investigation regarding military operations requires the weighing of special considerations, and will be done only as an exceptional*

measure. These principles apply, even more so, when the activity is clearly of a combat nature.

In this context, we refer , for example, to the following judgments:

HCJ 4550/94, *Isha v. Attorney General, Piskei Din* 49 (5) 859;

HCJ 6208/96, *Mor Haim v. IDF, Piskei Din* 52 (3) 835;

HCJ 7232/01, *Yusuf v,. Government of Israel, Takdin Elyon* 2003 (2) 3952.

16. We also refer the Court to the statutory arrangement enacted in 1997 – Section 539A of the Military Justice Law, 5715 – 1955. This section states that as a rule, an incident that takes place during a military operation is to be investigated by an operation debriefing, and not by an investigating body, and the findings of the inquiry are to be delivered to the JAG. Only in appropriate cases is the incident to be passed to an investigative body for investigation, after it meets a number of criteria set forth in the statute. This explanation, too, shows that opening a criminal investigation regarding a military operation must be considered on the merits of each case.

17. Furthermore, comprehensive legal research regarding the practice of foreign forces in opening criminal investigations relating to incidents during hostilities (for example, NATO forces in Yugoslavia and American forces in Iraq and Afghanistan) indicate, explicitly and clearly, that no army automatically opens criminal investigations in every instance in which a civilian is killed during the course of a military operation. On this point, it is sufficient to study the report of the committee appointed by the prosecutor of the International Criminal Tribunal on Yugoslavia, which held that it is not proper to conduct criminal investigations regarding NATO actions in which dozens and even hundreds of civilians were killed. See, *Final Report of the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia,* 13 June 2000 (published at www.un.org/icty/pressreal/nato031300.htm).

18. If necessary, we could of course expand on this subject, but as previously mentioned further discussion is unnecessary, because the aforesaid is sufficient to explain that the second part of the petition should be summarily dismissed, for the reason that the relief sought is general and theoretical, and should not be granted.

19. Therefore, for the reasons set forth above it is requested that both portions of the petition be summarily dismissed.

Today, 23 December 2003

[signed]

Shai Nitzan
Acting Head, Special Affairs Department